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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Best Western International Incorporated,

No. CV-22-00037-PHX-JAT

10 Plaintiff/Counterdefendant,

ORDER

11 v.

12 Brookfield Ventures LLC, et al.,

13 Defendants/Counterclaimants.
14

15 Pending before the Court is a motion to dismiss the counterclaim. The counterclaim
16 pleads four causes of action against the Counterdefendant: breach of contract, breach of
17 the implied covenant of good faith and fair dealing, fraud, and negligent misrepresentation.
18 (Doc. 20). Counterdefendant moves to dismiss the breach of contract, fraud and negligent
19 misrepresentation claims. (Doc. 26).

20 **Implied Covenant of Good Faith and Fair Dealing**

21 At page 6, the motion to dismiss states:

22 *See Thomas v. Montelucia Villas, LLC*, 302 P.3d 617, 621, ¶ 16 (Ariz. 2013)
23 (“To bring an action for the breach of the contract, the plaintiff has the burden
24 of proving the existence of the contract, its breach and the resulting
25 damages.”) (internal quotations omitted); *Tai v. Minka Lighting, Inc.*, 2017
26 WL 568519, at *4 (D. Ariz. Feb. 13, 2017) (**dismissing breach of the duty
of good faith and fair dealing claim because the claim “merely realleges
breaches of express contract terms.”**). Because Brookfield has failed to
allege sufficient facts to support its contract claims, those claims should be
dismissed.

27 (Doc. 26 at 6) (emphasis added). The bolded language is the sole reference in the motion
28 to dismiss to the covenant of good faith and fair dealing. The motion makes no argument

1 that *in this case* the claim “merely realleges breaches of express contract terms.” The Court
 2 will not reconcile the counterclaim line by line to do the analysis for Counterdefendant.
 3 Accordingly, to the extent the bolded language in a string cite was intended to be a motion
 4 to dismiss the breach of the implied covenant of good faith and fair dealing claim, the
 5 motion is denied as to this claim. (The Court notes that Counterdefendant dedicated a full
 6 section of its reply to this claim (Doc. 30 at 4) but the Court will not consider arguments
 7 raised for the first time in a reply.)

8 **Breach of Contract**

9 The motion to dismiss argues that Counterclaimant fails to allege facts to support a
 10 breach of contract claim; therefore, the breach of contract claim must be dismissed.
 11 Counterclaimant responds, and seems to concede that the counterclaim fails to allege such
 12 facts, but argues:

13 Similarly, Brookfield adequately pled breach. See FAC at ¶¶ 39-41.
 14 While Brookfield did not point to specific provisions of the contract that were
 15 allegedly breached, this is not required to state a claim under Rule 8 and is
 16 not enough to warrant dismissal. *See e.g., Little*, 516 F. Supp. 3d at 964.
 17 Notably, Brookfield pled that it did not receive the benefit of its bargain with
 18 Best Western because, as alleged, Best Western did not provide its promised
 19 services. This includes, but is not limited to, access to the reward system,
 20 access to a marketing scheme, and access to the brand name, all of which
 21 would assist Brookfield towards increased reservations and revenue. *See*
 22 FAC at ¶ 33. This meets the plausibility standard.

23 ...
 24 Additionally, Brookfield alleges that Best Western agreed to the
 25 suspension of various fees and assessments, which it breached by demanding
 26 payment and instituting this lawsuit. *See* FAC at ¶¶ 26-27.

27 (Doc 29 at 5).

28 Counterdefendant responds and argues that the Court should not consider the
 allegations in response to the motion to dismiss because:

Nowhere in the FAC does Brookfield specifically allege that Best Western
 did not provide Brookfield with access with the reward system, a marketing
 campaign or access to the brand name. In fact, Brookfield’s allegations
 demonstrate that Best Western provided those very services to Brookfield.
 [followed by examples from the counterclaim].

(Doc. 30 at 2).

Counterclaimant ends the response to the motion to dismiss with a request for leave
 to amend. (Doc. 29 at 10). In Doc. 26 at 10, Counterdefendant claims the parties conferred

1 and could not agree that the deficiencies could be cured by amendment. Yet, clearly
 2 Counterclaimants could, by amendment, make these additional allegations. *Shirley v.*
 3 *Univ. of Idaho, College of Law*, 800 F.3d 1193, 1194 (9th Cir. 2015) (Kozinski, J.
 4 concurring) (in this circuit, an amended complaint may directly contradict prior
 5 complaints). The parties' failure to have an agreement on the underlying factual
 6 allegations is the point of the Local Rule requiring them to confer. The Court will allow
 7 amendment.

8 Additionally, the motion to dismiss fails to address that Counterclaimants appear to
 9 have a theory that the contract was modified, and as modified, breached. (Doc. 29 at 5
 10 (citing FAC at ¶¶ 26-27)). In the reply, Counterdefendants argue that Counterclaimants
 11 failed to allege a sufficient factual basis for this alternative theory of breach of contract.
 12 (Doc. 30, n. 1). Again, the Court will not consider arguments made for the first time in a
 13 reply.

14 **Fraud and Negligent Misrepresentation**

15 Counterdefendant moves to dismiss the fraud and negligent misrepresentations
 16 claims for the same reasons: 1) an alleged failure to plead with particularity under Federal
 17 Rule of Civil Procedure 9(b); and 2) that all representations were allegedly about future
 18 predictions or opinions about performance. (Doc. 26 at 7, 9).

19 Counterclaimants respond and list examples of particular representations of current
 20 or past events that it claims might be fraudulent, for example:

21 Brookfield has alleged that Best Western claimed **“that the hotel was**
 22 **in an area that was competitive and appealing to high-end and business**
 23 **class travelers”** (FAC ¶ 10); that **“success had been seen in other markets**
 24 **by other hoteliers who had affiliated with and became a Best Western**
 25 **Premier hotel”** (*Id.* at ¶ 11); that **“Best Western Premier hotels in other**
 26 **markets compete well against other high-end and business class hotels**
 27 **from other well-known hotel brands”** (*Id.* at ¶ 12); that Brookfield would
 28 **have access to the rewards, reservation, and marketing systems that are**
competitive with third-party sites and have a history of increasing
reservations (*Id.* at ¶¶ 13-14, 56).

29 ...
 Brookfield contends, upon information and belief, that all of these
 representations were false. *Id.* at ¶¶ 24-25.

(Doc. 29 at 7) (emphasis added).

1 In reply, Counterdefendant argues that many statements (not quoted above) alleged
2 in the counterclaim are either future promises or opinions, which Counterdefendant argues
3 are not actionable. The Court need not rule on these additional statements one by one here.
4 Instead, the issue is whether the fraud and negligent misrepresentation claims as a whole
5 should be dismissed.

6 Counterclaimants argue that based on the above-quoted four representations, these
7 two claims should not be dismissed. The reply does not address these four statements
8 specifically.

9 The Court finds that the bolded statements quoted above could be factually true or
10 false at the time made: for example, whether other hotels that affiliated with Best Western
11 in the past experienced success. Also, whether Counterclaimants' hotel was in a
12 competitive area would have been true or false at the time the statement was made. Finally,
13 whether Counterclaimants would have access to systems that were competitive with other
14 third-party systems would be true or false as to: 1) whether there was in fact access; and 2)
15 whether those systems were comparable to other competitive systems. Further, the Court
16 agrees that other hotels' profit information, whether Counterdefendant has accessible,
17 competitive systems, and whether Counterclaimants hotel was in a good area would be in
18 Counterdefendant's possession. The Court notes that Counterclaimants claim to have
19 relied on these statements in choosing to affiliate. Thus, the Court finds that these
20 statements are enough to state a claim for fraud and negligent misrepresentation purposes
21 of a surviving a motion to dismiss.

22 Next, Counterdefendant argues that it does not know who made the statements
23 (allegedly) and in what context. This deficiency can be cured by amendment. *See 7-Eleven*
24 *Inc. v. Puerto Rico-7 Inc.*, 2008 WL 4951502, *7 (N.D. Tex. 2008). Moreover, the parties
25 have been in discovery for six months; thus, at this point some of this information should
26 have been discovered. Finally, to the extent Counterclaimants allege that the information
27 about who made these statements and when they made them is solely in
28 Counterdefendant's possession, Counterclaimants can allege, on information and belief,

1 that the statements were made by Counterdefendant's agents if they can do so in good faith.
2 *See Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).¹

3 **Conclusion**

4 As discussed above, the Court finds that the deficiencies identified by
5 Counterdefendant can all be cured by amendment. Accordingly, the Court will grant leave
6 to amend. The Court is confused how this result was not obvious in the parties' required
7 meet and confer.

8 Counterclaimants are cautioned that the second amended counterclaim will
9 completely supersede the first amended counterclaim; thus, all allegations must be
10 contained therein, without incorporation by reference to other filings. *See Ramirez v.*
11 *County of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015). The second amended
12 counterclaim must be filed by the deadline specified below. Because this amendment will
13 be Counterclaimants' third filing to attempt to state a claim, they should not anticipate
14 further leave to amend to allege more facts. They should include all necessary and relevant
15 facts in this amendment.

16 If Counterclaimants elect not to amend, only the modification theory of breach of
17 contract and the alleged breach of the implied covenant of good faith and fair dealing
18 counterclaims will survive. All other theories of breach of contract and the claims for fraud
19 and negligent misrepresentation will be dismissed.

20 Accordingly,

21 **IT IS ORDERED** that the motion to dismiss the counterclaim (Doc. 26) is granted
22 in part and denied in part as specified above.

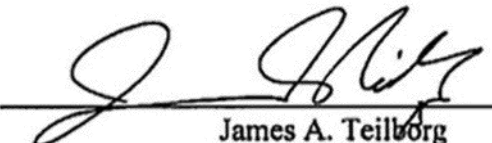
23 **IT IS FURTHER ORDERED** that Counterclaimants may file a second amended
24 counterclaim within 14 days of the date of this Order (any amended counterclaim must

25
26 ¹ The Court notes that in the reply, Counterdefendants argue that certain emails are not
27 properly incorporated by reference into the counterclaim and that the emails do not show
28 the "statements" on which Counterclaimants rely in the counterclaim. Counterdefendant
did not specifically address the four bolded statements relied on in the response and by the
Court. Again, the Court did not go line by line through the emails to see if these four
statements were impacted by these arguments. However, to the extent they are, this issue
can also be cured by amendment.

1 include a clean copy and a copy that complies with LR Civ. 15.1).

2 **IT IS FURTHER ORDERED** that Counterdefendant must answer the first
3 amended counterclaim within 21 days of this Order if no second amended counterclaim is
4 filed; Counterdefendant must answer or otherwise respond to a second amended
5 counterclaim within 28 days of this Order if one is filed within the deadline set herein.

6 Dated this 8th day of March, 2023.

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12 James A. Teilborg
13 Senior United States District Judge
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